SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1295

OXNARD SCHOOL DISTRICT BOARD OF TRUSTEES,
Petitioner,

vs.

DEBBIE AND DOREEN SORIA, *et al.*,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Question Presented.

Whether, pending the outcome of a trial on the sole issue of "intent to segregate", the *status quo* should be disturbed by staying the operation of a remedial integration plan which has been in effect for three years.

Statement of the Case.

The respondents, a class composed of Mexican-American and Black children, filed suit in the United States District Court for the Central District of California (hereinafter District Court) in February of 1970, alleging that the schools in petitioners' district were racially segregated and that said segregation was the result of acts and omissions of the petitioners. Re-

spondents sought an order desegregating the twelve elementary schools in petitioner school district. On May 10, 1971, after extensive discovery had been undertaken, respondents moved for Summary Judgment, based upon the answers to interrogatories, admissions, affidavits and proposed findings of fact. The District Court granted the Motion for Summary Judgment on May 12, 1971. See *Soria v. Oxnard School District Board of Trustees,* 328 F.Supp. 155 (1971).

The petitioners twice sought stays in 1971 from the United States Court of Appeals for the Ninth Circuit (hereinafter Ninth Circuit) and once from the District Court; all were denied without opinion. Again in 1972, petitioners sought stays in the Ninth Circuit (467 F.2d 59) and in this Court; all were denied. Thus, the school district has been integrated since September of 1971, as a result of the District Court's decision.

Meanwhile, petitioners had appealed the Summary Judgment of the District Court. On November 27, 1973, the Ninth Circuit vacated the Summary Judgment and remanded the case to the District Court with instructions to make findings as to whether the petitioners intended to segregate the schools. See *Soria v. Oxnard School District Board of Trustees,* 488 F. 2d 579 (1973). Since the Ninth Circuit found the District Court's opinion "inconclusive and vague" on the question of segregative intent, the District Court was ordered to hold a trial on the single question of whether or not petitioners had the requisite segregative intent. 488 F.2d at 587-588.

The Ninth Circuit also refused to disturb the existent desegregation plan implemented by the District Court:

> "Since the fall of 1971, the School Board has been operating under the District Court ordered desegregation plan. We shall not at this time undo that result and the remedial integration order shall remain in effect *subject to the District Court's discretion* and final resolution of this litigation." (Emphasis added.) 488 F.2d at 588.

Subsequent to the expiration of time in which to request a rehearing before the Ninth Circuit, and subsequent to the spreading of the mandate before the District Court, petitioners sought a stay from the Ninth Circuit of that portion of its mandate which allowed the remedial integration plan to remain in effect. On February 27, 1974, the Ninth Circuit denied the stay without opinion. The petition to this Court followed.

A pretrial hearing in the District Court is now scheduled to be held on May 20, 1974, and the trial, which is estimated to last approximately five days, is now scheduled to begin on June 4, 1974.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

The question which petitioners present is not yet ripe for consideration by this Court and is untimely in that petitioners have not pursued their appropriate remedies in the District Court nor in the Ninth Circuit. *Cf. Walters v. City of St. Louis,* 347 U.S. 231 (1954). Before presenting their petition to this Court, petitioners should have first requested the District Court to halt the remedial integration plan and requested the Ninth Circuit to rehear the case or to recall its mandate.

1. Petitioners Failed to Exhaust Their Judicial Remedies in the District Court and in the Ninth Circuit.

The Ninth Circuit's recent decision refusing to disturb the remedial integration plan properly recognized that the immediate undoing of the remedial integration plan would cause chaos in the school district, but left the continuation of that plan subject to the District Court's discretion.

It is a very basic notion that a higher court should not consider the question until and unless it was first presented in the lower courts. *Cf. Walters v. City of St. Louis, supra; Hormel v. Helvering,* 312 U.S. 552 (1941). The petitioner has failed to move in the District Court or otherwise attempt to have the District Court exercise its discretion to accomplish what petitioners are now seeking to accomplish before this Court. Petitioners should first petition the District Court in this matter; that Court is in the best position to fully evaluate all consequences and effects of changing its original order through the taking of evidence. See *Soria*

v. Oxnard School District Board of Trustees, 488 F. 2d at 588.

Moreover, petitioners also have failed to move for a rehearing in the Ninth Circuit and to request that Court to recall its mandate. Thus, there has been a complete failure on petitioners' part to have the District Court and the Ninth Circuit consider the discontinuance of the remedial integration plan.

2. The Ninth Circuit Has the Power to Prevent Irreparable Damage to Respondents.

The Ninth Circuit, acting under its equity powers, properly exercised this power in preventing the irreparable harm that would be caused by the sudden discontinuance of the remedial integration plan prior to a final District Court decision. It is well established that appellate courts have such power, as stated in *In re Barnett,* 124 F.2d 1005 (2d Cir. 1942):

> "It is established doctrine . . . that in disposing of a case before it, that an appellate court has a broad power 'to make such disposition . . . as justice requires.' " 124 F.2d at 1009.

See *State of Minnesota v. National Tea Company,* 309 U.S. 551, at 555 (1940).

Other cases support the position that the Court has the necessary power to continue the remedial integration plan. In the case of *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1965), *cert denied* 383 U.S. 936 (1966) the Court stated that the Court "has the power and inescapable duty, whether under the all-writs statute, 28 U.S.C. §1651, or under its inherent powers of appellate jurisdiction, to effectuate what seems to us to be the manifest ends of justice." The manifest ends of

justice herein is the continuation of the remedial desegregation plan.

3. A Decision on the Merits Will Be Reached in the District Court Before a Hearing on the Writ Would Normally Be Held by This Court.

Granting the Petition would serve no useful purpose because the only question which petitioners are attempting to raise concerns the propriety of continuing the remedial integration plan pending the outcome of a trial on the issue of segregative intent. *Cf. United States v. American Broadcasting-Paramount Theaters,* 383 U.S. 906 (1966) (Petition denied). The trial is scheduled to begin on June 4, 1974, and the District Court's decision should be available soon thereafter.

In their unsuccessful motion for a stay in the Ninth Circuit, petitioners concede that even if they had the legal authority to return to segregated neighborhood schools, they would not do so during the present school year, but would only do so in the fall of 1974. See Application for Stay Pending Review on Writ of Certiorari, pages 1 and 27 (Application denied by Justice Douglas on March 14, 1974). Since the District Court's decision should be available in sufficient time for petitioners to plan for the fall 1974 school year, there is no good reason for this Court to grant the Writ.

4. The Decision Below Does Not Conflict With the Decisions of This Court.

The Ninth Circuit, in vacating the Summary Judgment, made it quite clear that it was following the two cases which petitioners cite, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); and *Keyes v. School Dist. No. 1, Denver, Colorado,*

..... U.S. ....., 93 S.Ct. 2686 (1973). See *Soria v. Oxnard School District Board of Trustees, supra,* 488 F.2d at 585. There was no attempt on the part of the Ninth Circuit to distinguish these cases or otherwise deviate from their requirements.

The Ninth Circuit remanded the case to the District Court for a factual determination of whether the School Board intended to segregate the school district and, pending the determination of that issue, continued the existing desegregation plan. This continuation of the plan can in no way be construed as causing a conflict with decisions of this Court.

5. The Decision of the Ninth Circuit Creates No Confusion Among School Boards.

This case is unique in that a desegregation plan has been in effect for three years. The Ninth Circuit, in vacating the Summary Judgment, also faced the question of what to do pending the trial on the single factual question of intent to segregate. That Court correctly decided that it would allow the *status quo* to continue, at the discretion of the District Court, until there was a resolution in the District Court. In no sense does the decision of the Ninth Circuit stand for the proposition that school districts are subject to desegregation orders without a finding of intention to segregate.

It is important to note that in its Summary Judgment the District Court *did* find intention to segregate under the standard that then existed. See *Soria v. Oxnard School District Board of Trustees, supra,* 328 F. Supp. at 157. Now three years later, that standard has been clarified by this Court in *Keyes v. School*

Dist. No. 1, Denver, Colorado, supra, 93 S.Ct. at 2697. The District Court must now determine whether the actions and inactions of the petitioners amounted to intentional segregation under the *Keyes* standard. In the interim, the desegregation plan remains in effect, subject to the discretion of the District Court.

Conclusion.

For the above reasons, this Court should deny the Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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